Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Extension of Section 272 Obligations	)	WC Docket No. 02-112
of Southwestern Bell Telephone Co.	)	
In the State of Texas	)	

COMMENTS OF BIRCH TELECOM ON PETITION OF AT&T CORP. FOR EXTENSION OF SECTION 272 OBLIGATIONS OF SOUTHWESTERN BELL TELEPHONE CO. IN THE STATE OF TEXAS

Albert H. Kramer
Robert F. Aldrich
DICKSTEIN SHAPIRO MORIN
& OSHINSKY LLP
2101 L Street, N.W.
Washington, DC 20037-1526
(202) 828-2226 (Tel)
(202) 887-0689 (Fax)

Gregory C. Lawhon
Senior Vice President & General Counsel
Russell C. Merbeth
Federal Policy Counsel
BIRCH TELECOM
2020 Baltimore Avenue
Kansas City, MO 64108
(816) 300-3731 (Tel)
(816) 300-3350 (Fax)

Counsel for Birch Telecom

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SUMMARY

Recent anticompetitive conduct by Southwestern Bell Telephone ("SWBT") against Birch Telecom and other competitive local exchange carriers ("CLECs") confirms that the Commission must not allow the sunset of Section 272 requirements. Such conduct is relevant to the Section 272 sunset issue because: (1) it demonstrates that SWBT retains market power in the local service market in Texas; (2) it prevents sufficient local service competition from emerging in Texas to challenge SWBT's market power; and (3) it demonstrates the sort of anticompetitive conduct to which the long distance market will be subjected if the Section 272 separate subsidiary requirements are removed.

Birch has numerous complaints pending against SWBT concerning the latter's anticompetitive conduct. In one case, an ostensible mistake by a SWBT employee processing the conversion of a single customer from Birch to SWBT resulted in the disconnection of 75 other Birch customers. Almost as disturbing as the incident itself is the fact that SWBT retail service employees have such ready access to information about CLEC customers – and would have similar access to long distance carriers' customer data if Section 272 requirements were allowed to sunset.

In another case, Birch, and other CLECs have complained that SWBT is denying DS-1 UNE loops to CLECs for provisioning service to end user customers on the grounds of "no facilities" being available, while making DS-1

facilities available for the same orders if the CLEC orders the same facilities as special access services at the higher special access price.

In a third case, SWBT has doubled the recurring collocation power charges assessed to Birch and other CLECs, including back-billing of the increased charges for service dating back a year or more, by speciously reinterpreting its collocation tariff to require charges for redundant power.

In considering whether to lift the Section 272 safeguards on SWBT' s operations in Texas, the Commission must take into consideration SWBT actions such as those described in the preceding sections which provide substantial evidence of the as-yet unchecked power of SWBT to unilaterally take actions that have a significant adverse impact on local competition.

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Birch Telecom ("Birch") respectfully submits these comments in support of the Petition of AT&T Corp. for a three year extension of the Section 272 safeguards applicable to Southwestern Bell Telephone Co. ("SWBT") in Texas. In light of SWBT's continuing and worsening anticompetitive conduct against CLECs in Texas, the FCC must not allow sunset of Section 272 requirements. SWBT's ineffectively restrained anticompetitive conduct against CLECs is relevant to the Section 272 sunset issue because: (1) it demonstrates that SWBT retains market power in the local service market in Texas; (2) it prevents sufficient local service competition from emerging in Texas to challenge SWBT's market power; and (3) it demonstrates the sort of anticompetitive conduct to which the long distance market will be subjected if the Section 272 separate subsidiary requirements are removed.

I. DESCRIPTION OF BIRCH

Birch provides competitive local telecommunications services using a combination of its own facilities and UNE-P. As a result of its merger with ionex Telecommunications in March 2003, Birch serves over 170,000 customers with over 500,000 lines in the Southwestern Bell (including Texas), Qwest, and BellSouth regions. Birch serves the "lost" market - customers and areas that would otherwise not see the benefits of competition - targeting small businesses and serving residential customers as well. Birch serves outer suburbs and small towns, as well as the dense business districts of the largest cities throughout its service territory. Birch offers an integrated suite of valued-added services, including local and long-distance voice services, dial-up Internet access, dedicated Internet access services through T-1s and high-speed DSL circuits (SDSL), web hosting and design services, and customer premises equipment, including key systems, PBXs, routers, and integrated access devices for its integrated voice and data offerings.

Birch's target customers typically do not have a dedicated telecom manager, usually do not have a network administrator on staff, and often do not even have an office administrator to handle the telecom and Internet access needs of the business. Without Birch, these customers are unlikely to wade through the maze of multiple service and equipment vendors necessary to integrate these services, even if available. Birch's integrated service and product offerings allow very small businesses and home offices to obtain all the benefits of advanced voice and data products that typically are available only to much larger enterprises in larger cities.

Unrestricted availability of unbundled switching in its markets has allowed Birch to serve all types of customers throughout a metropolitan area and in smaller towns. Without the ability to serve customers in the densest portions of big cities, Birch could not afford to serve secondary markets. In the areas of Texas served by SWBT, the loop and end-office facilities necessary to support Birch's comprehensive services to all types of customers are currently unavailable from any carrier except SWBT.

II. SWBT's CONSISTENT FAILURE TO COMPLY WITH FEDERAL AND STATE LAWS AND REGULATIONS WARRANTS EXTENSION OF SECTION 272 SAFEGUARDS FOR SWBT IN TEXAS.

As even a cursory review of pending competitive local exchange carrier ("CLEC") complaints at the state and federal level reveals, the record is replete with evidence that, since SWBT was granted Section 271 authority for Texas in June 2000, its anticompetitive conduct has become even more egregious and injurious to local service competition. It is difficult to escape the conclusion that SWBT is determined to drive its competitors from the Texas marketplace by systematically engaging in conduct that violates state and federal laws and regulations. In Texas alone, Birch, by itself and in conjunction with other CLECs, has brought numerous separate proceedings against SWBT, the facts of which indicate a course of serious misconduct by SWBT causing substantial harm to local service competition in Texas. At best, these complaints, allegations and supporting facts reveal an institutional unwillingness by SWBT to fulfill its fundamental obligations under federal and state law. At worst, they indicate that SWBT has the unfettered ability and desire to destroy the businesses and operations of its competitors in the local service marketplace.

In either case, it is clear that the minimal competition that SWBT faces from other facilities-based competitors has done little or nothing to incent SWBT to provide adequate service to CLECs dependent on SWBT facilities. To the contrary, now that SWBT has safely secured its long-sought interLATA long distance authority in Texas, it has begun to treat CLECs worse than ever. Such anticompetitive conduct against CLECs continues to prevent the emergence of sufficient local service competition to significantly erode SWBT's market power in Texas. Further, the record of SWBT's anticompetitive practices in the local service market, where separate subsidiary requirements do not apply, clearly indicates the kind of harm to which the interexchange market also will be exposed if the Section 272 separate subsidiary requirements are lifted.

Certainly, given its history of anti-competitive conduct, as evidenced not least by the substantial fines and penalties paid by SWBT for violations of its unbundling obligations and its provisioning commitments, and given the facts of the pending complaints as detailed below, as well as the declining market share of CLECs in Texas, the lifting of the 272 obligations of SWBT in Texas is unwarranted and would further erode the ability of regulators to identify and prevent market power abuses by SWBT in a post-271 environment.

A. Birch Telecom's Complaint of End User Service Disruption and Petition to Open Investigation into SWBT Structural Separation.

On October 18, 2002, Birch filed a petition with the Texas PUC describing conduct by SWBT that is all too common and recognizable by CLECs: the disruption of service to numerous unsuspecting customers as a result of what SWBT claimed was a single incorrect keystroke by a retail service representative converting a single Birch customer to SWBT.[1] This single data entry error resulted in SWBT's systems returning circuit information not just on the one account to be converted, but on all Birch end user accounts within a geographically related data area. The error occurred despite various informational cues and red flags that should have alerted the retail sales representative that numerous accounts unrelated to the one in question would be affected by the change in service, and without any cross-checking with individual end users as to whether disconnections had been authorized. The one attempt at verification appears to have been between the retail sales representative processing the order and the agent acting on behalf of the authorized end user in question. To the question of what to do with the additional circuits retrieved by the data search, the answer coming back appears, disconcertingly, to have been simply: disconnect all circuits retrieved. As a result of this episode, 75 customers, identified on each account as Birch end users, lost service.

The error occurred even though the SWBT retail representative reportedly had input the correct telephone number-based circuit identification number for the intended end user. The error occurred even though the SWBT retail representative had in hand the intended end user's listed name, listed address, service address, directory information, billing name and address, billing cycle, TAR (tax area), tax exemption information, circuit number, and SIC (standard

[1] *See* Birch's Complaint of End User Service Disruptions and Petition to Open Investigation into SWBT structural separation, Public Utility Commission of Texas, Docket No. 26814, filed October 18, 2002 (Exhibit A to these comments).

industry code) – a collection of information none of which matched any but one of the 75-plus end user accounts included on the disconnect order. The error occurred even though the intended end user had completed a Letter of Authorization which detailed the billing telephone number and all associated telephone numbers that were to be migrated.

The error occurred even though the SWBT retail representative recognized as "unusual" the appearance of additional circuit IDs in response to entry of the circuit ID data of a single end user. In fact, because the return of the additional circuit data other than that contained on the service request was unusual, the SWBT retail service representative processing the order apparently contacted the SWBT retail sales representative for the end user. In response to the inquiry as to what to do with the additional circuits retrieved, the SWBT service representative processing the migration was instructed to disconnect all of the circuits. No attempt was made to cross-check with the individual end users or with Birch as to whether the disconnections were in fact authorized.

Apart from SWBT's egregious disconnection of 75 Birch customers, this episode illustrates the unacceptable fact that SWBT's retail organization has ready access to data on its wholesale customers' customers. On-line technical publications confirm that SWBT retail representatives can easily retrieve CLEC end user data not just inadvertently, but intentionally and purposefully. With a few simple manipulations of data, SWBT retail representatives can retrieve CLEC end user customer data within a geographic area. This fact directly contradicts SWBT's position that under normal circumstances, a representative processing a conversion order only has access to information about the circuit(s) being converted or disconnected. In fact, SWBT's retail operation has unrestricted access to wholesale data, including Carrier Proprietary Information (CPI) on CLEC end user accounts. The complete absence of a separate-subsidiary "firewall" between SWBT's retail organization and the data of CLEC end users creates the conditions allowing errors and service disruptions to occur.

However the SWBT retail service representatives may choose to proceed, the indisputable fact is that they have ready and unrestrained access to databases from which they can retrieve at least an entire billing account network's ("BAN") worth of end user data at a time for any given CLEC. No restrictions have been disclosed requiring SWBT's retail order processors to positively indicate customer authorization for the individual end user accounts within that CLEC's BAN before accessing the information on, or before generating service orders impacting, those accounts. SWBT represents that it had received a Letter of Authorization from the single intended end user, but obviously the number of circuits together with the number of end user accounts impacted do not correlate to the information reportedly contained on the single end user authorization.

The above-described misuse of CLEC end user data resulting in service interruption to Birch customers was not an isolated event. In May 2002, for example, Birch received a No Dial Tone trouble report from an apartment complex clubhouse and leasing offices. In the process of resolving the trouble, Birch learned that SWBT had disconnected its customer's service in error and had used the existing Birch customer's network facilities to turn up new service for an apartment tenant who had ordered SWBT service. Although records showed that there was working service at the address used to process the disconnect, SWBT retail mistakenly made the determination that the existing service must have been abandoned. Because the Birch customer's facilities were used for the new SWBT end user and because the lines impacted had hunting capability, restoration of service was complicated. The Birch customer's service was not fully restored for more than seven days.

Had SWBT retail been required to process the new service request through a structurally separate wholesale entity, more effective processes would have been in place to prevent the accessing and misuse of a CLEC's existing end user data on a new SWBT retail service installation. From a provisioning perspective, a separate intermediary observing that a competitor was the local service provider of existing service at the address where new service is requested hopefully would do more than assume that the service had been abandoned.

This incident, and similar incidents experienced by other CLECs, is an all too common example of the vast distance yet to go in the effort to create a workable environment for wholesale services in the local market. If Section 272 requirements are removed, the same types of abuses will be repeated in the interLATA long distance market. Despite the conclusion reached three years ago that SWBT's local markets in Texas are "open" to competition, this incident demonstrates that processes and market incentives sufficient to ensure the compliance of SWBT with its obligations as a wholesale service provider still have a long way to go before regulators no longer need the arsenal of structural, accounting, and nondiscrimination checks on market power that Section 272 provides.

B. Joint Complaint and Request for Interim Ruling for Post-Interconnection Agreement Dispute Resolution with SWBT Regarding DS-1 UNE Loop Provisioning Rules.

In November 2002, Birch, along with Allegiance, El Paso Networks, XO, and other CLECs filed a petition with the Texas PUC alleging that SWBT had unilaterally stopped making DS-1 UNE loops available to CLECs for provisioning service to end user customers on the grounds of "no facilities" being available, when in fact SWBT would make DS-1 facilities available for the same orders if the CLEC ordered the facilities as special access services at the higher special access price point. The petition was premised upon SWBT's violation of state and federal law and the commitments SWBT made to obtain authority to provide in-region interLATA services in Texas.[2]

SWBT's practice of limiting CLEC access to DS-1 UNE loops, and the underlying internal SWBT policy rationale for such limitation, began in October 2002, when SWBT imposed new provisioning procedures that immediately and severely diminished Texas CLECs' ability to serve their end user customers using DS1 UNE loops. Without any advance warning or notice to CLECs, SWBT began to operate under new internal procedures for conditioning and provisioning DS1 UNE loop facilities. The new procedures changed SWBT's long-standing policy on provisioning DS1 UNE loop orders when, according to SWBT, "no facilities" are available to fill those orders.

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[2] *See Joint CLEC Complaint For Post-Interconnection Dispute Resolution With Southwestern Bell Telephone, L.P. And Request For Interim Ruling Regarding DS1 UNE Loop Provisioning Issues*, Public Utility Commission of Texas, Docket No. 27001 (Exhibit B to these comments).

Local competition in Texas is dependent upon the ability of CLECs to order and provision DS1 UNEs effectively and efficiently. Many CLECs use DS1 loops to connect CLEC facilities to customer premises and to offer competitively priced integrated voice and data products, and other broadband services. Indeed, the DS1 UNE is critical in the segments of the local service market in Texas where many CLECs are experiencing the greatest success. Without access to a cost-based DS1 UNE, CLEC competition against SWBT's "T-1" services, and the offering of bundled broadband and voice services over a DS1 UNE loop, is impossible.

The impact of SWBT's abrupt and unannounced change in DS1 UNE loop provisioning on CLEC businesses was immediate and dramatic. Where CLECs historically had experienced up to five percent of their DS-1 UNE loop orders being rejected each month with "no facilities" or "lack of facilities" ("LOF") Jeopardy Codes, those rates suddenly shot up to as much as thirty percent or more of their orders rejected for that reason. SWBT offered no explanation of the sudden increase in the rate of LOF failures and often refused to explain its new policy when CLEC representatives followed up to address the issue. Despite numerous CLECs attempting to engage SWBT on the issue, SWBT was and remains evasive about the underlying policy rationale resulting in the "no facilities" determinations and, to date, has released only limited information revealing its change in procedures.

Nevertheless, despite the apparent dearth of facilities available as DS-1 UNEs, SWBT has appeared able and willing to provision those same circuits as special access services ordered out of SWBT's tariff. Indeed, when, instead of delivering DS-1 UNE loops, SWBT began delivering "no facilities" rejections, many CLECs were forced, as a result of commitments to provide service to customers by specific dates, to fulfill their commitments at the higher non-UNE rate by using SWBT' s special access service. Even though both provide the same network functionality, special access service is available only for a substantially higher price than that charged for a DS1 UNE loop. The "no facilities" problem for a UNE often appears to be no problem at all when the CLEC, or any other customer, orders the same circuit as special access.

In addition to the provisioning delays caused by SWBT' s new DS-1 UNE procedures, and the resulting damage to the ordering CLEC' s reputation in the marketplace, there are serious, easily quantified economic harms that these new policies create. As a consequence, Birch and the other participants in the complaint filed with the Texas PUC are seeking not merely a change in SWBT' s policies, but also seek to recover for the economic harm they have suffered by paying at the special access tariff rate for facilities they are entitled to order and have provisioned at the much lower, cost-based UNE rate.

The harm that SWBT has caused by effectively withdrawing, at will, a significant UNE facility from availability is not a matter of speculation, but is very real and easily identifiable. It is, further, an example of the sort of harm to competition that can be caused only by a firm with unfettered market power, and directly contravenes: (a) section 251(c)(3) of the federal Telecommunications Act of 1996 ("FTA")[3] and the FCC rules implementing it; (b) the competitive

[3] Telecommunications Act of 1996, Pub L. No. 104-104, 110 Stat. 56 (codified as amended in scattered sections of 15 and 47 U.S.C.).

safeguards of the Public Utility Regulatory Act ("PURA")[4]; and (c) SWBT's commitments to the Texas PUC and the FCC made during the FTA § 271 process that resulted in SWBT's entry into the Texas interLATA services market.

C. Complaint against SWBT Regarding Overcharges for Power under SWBT's Physical Collocation Tariff.

In a sequence of events as difficult to rationalize as those in the above-described matter, SWBT began in October 2002 to re-bill Birch and other CLECs for recurring collocation charges dating back at least to the October 2001 time period.[5] These charges included recurring power charges, and represented a true-up bill for charges dating back a year or more, to the effective date of the permanent collocation rates as authorized by the Texas PUC.[6]

With permanent physical collocation rates in place effective October 28, 2001, Birch awaited a SWBT true-up proposal between the interim and permanent rates. Birch expected that SWBT would present it with a true-up for

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4 Public Utility Regulatory Act, Tex. Util. Code Ann. §§ 11.001-63.063 (Vernon 2001) (PURA).

5 *See* Complaint of Birch Telecom of Texas, Ltd., L.L.P., AT&T Communications of Texas, L.P., TCG Dallas, and Teleport Communications of Houston, Inc., Against Southwestern Bell Telephone, L.P., Regarding Overcharges for Power Under SBC-Texas's Physical Collocation Tariffs, Public Utility Commission of Texas, Docket No. ____, filed March 26, 2003. (Exhibit C to these comments).

6 The interim collocation (physical and virtual) rates were established in Project No. 16251, *Investigation of Southwestern Bell Telephone Company's Entry Into the Texas InterLATA Telecommunications Market*, Order No. 52 at 3 (Sept. 8, 1999). The permanent collocation rates were approved in Docket No. 21333, *Proceeding to Establish Permanent Rates for Southwestern Bell Telephone Company's Revised Physical and Virtual Collocation Tariffs*, Order Approving Revised Arbitration Award (June 4, 2001) and Notice of Compliance Filing and Setting of Effective Date (Feb. 19, 2002).)

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all nonrecurring and recurring rates from the effective date of the interim rates through the effective date of the permanent rates. It was not until October 25, 2002, some twelve (12) months after the effective date of the permanent collocation rates, that SWBT re-billed Birch for all of the collocation recurring charges, which included power recurring charges.[7] In the SWBT true-up bill, SWBT billed Birch for recurring power charges that basically doubled Birch's power charges based on SWBT's decision to charge Birch for redundant DC power, in addition to the power requested for each arrangement.[8] Birch timely and properly disputed this amount as being an improper calculation of the true-up for DC Power Consumption rates during the true-up period. Upon further investigation, Birch determined that SWBT is also charging Birch late payment charges on the disputed amounts despite SWBT's and Birch's agreement that Birch did not have to pay the disputed amounts until the issue was resolved. At no time did SWBT notify or even discuss with Birch that SWBT would impose late payment charges to any disputed amounts.

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[7] Birch anticipated that rather than receive a bill from SWBT with true-up charges, SWBT would have provided true-up calculations in the form of a proposal to allow Birch to determine the methodology used by SWBT, as well as allow the parties to discuss any disagreements with the proposed true-up calculations. Instead, SWBT simply sent a bill, which then required Birch to spend an inordinate amount of resources simply to ascertain what was included in the true-up bill. To date, even though requested, Birch still has not received a spreadsheet showing how SWBT reached the true-up amounts for both nonrecurring and recurring rates for the collocation arrangements. It appears that SWBT retroactively trued up all of Birch's collocation arrangements to the beginning of each individual order date, which preceded even the § 271 proceeding.

[8] Birch generally uses the same equipment and footprint for all of its end office collocation arrangements in Texas. Birch requested 40 amps of power for each end office collocation arrangement.

Then on September 17, 2002, eleven months after the effective date of the permanent collocation rates, SWBT issued its regular monthly invoice to Birch, which included charges for Birch's current collocation arrangements. Upon investigation of the invoice, Birch determined that, without prior notice, explanation, or discussion, SWBT began to charge Birch for DC Power Consumption based on the power requested for the arrangement and for redundant power for the same arrangement. Birch disputed the collocation power charges on the basis that SWBT was not authorized under the Physical Collocation Tariff to charge for redundant power. For the September 2002 invoice, the amount in dispute for the power related overcharges was $32,892.56. Since that time, SWBT has unlawfully continued to charge Birch power rates in excess of the tariffed rates on an average of $80,000 per month. As of the filing of its complaint with the Texas PUC, the total amount in dispute for Birch is $2,302,797.37 in disputed recurring power charges and $9,819.69 in late payment charges.

The dispute is very straightforward. SWBT unilaterally and without PUC approval has changed its interpretation of Sections 20.5 and 21.5 of the Physical Collocation Tariff to magically enable it to basically double the power costs associated with each collocation arrangement. As a result, SWBT is in direct violation of § 53.004(a) of PURA, which provides, "[a] public utility may not directly or indirectly charge, demand, or receive from a person a greater or lesser compensation for a service provided or to be provided by the utility than the compensation prescribed by the applicable tariff . . . ." SWBT claims that there is nothing in the Tariff preventing it from charging for redundant power, in addition to the power provided to the collocation arrangement, but has never been able to: (1) point to any Tariff provision that affirmatively authorizes SWBT to charge for both the power arrangement and redundant power; (2) justify a change in interpretation of the Tariff, which has not been modified, effective July 1, 2002; or (3) point to any aspect of the decisions reached in Docket No. 21333, in which permanent rates were established, to support its new interpretation of what it is entitled to charge for power.

A simple example shows the financial implications of SWBT's latest and newest attempt to overcharge under the Physical Collocation Tariff. For example, if a Collocator orders 20 amps from SWBT as part of its collocation arrangement (effectively, the Collocator obtains two 20 amps A and B feeds). In that situation, for the 20 amp arrangement used by the Collocator for one month, the Collocator would be charged a nonrecurring rate of $7.36[9] per amp, or $147.20. In sharp contrast, SWBT's new and unilateral interpretation is that as of July 1, 2002, it can charge for 40 amps of power - for both the 20 amp power arrangement PLUS 20 amps of redundant power - thus resulting in doubling the monthly power consumption charge to $294.40 per month. While the number in isolation does not seem objectionable, it is objectionable because the result of the SWBT's new interpretation roughly doubles Complainants' power consumption costs, the single most expensive component for collocation arrangements. The aggregate result of this doubling, as stated above, is to increase Birch's collocation charges by millions of dollars. SWBT's true-up retroactively imposed this latest interpretation resulting in a significant imposition of excessive and

[9] *See* Physical Collocation Tariff, § 21.5 (Att. 3).

unlawful charges and associated late payment charges; dollars that SWBT is not authorized to charge for or to recoup.

D. The Threatened Termination of Independent Performance Measurements and Standards.

On August 16, 1999, the Texas PUC issued an order approving SWBT's proposed generic statewide interconnection agreement (T2A), including performance measurements that govern the quality of SWBT's provision of services to competitive telecommunications carriers, and that set forth monetary penalties or assessments for noncompliance with performance measurements.[10] Following approval of the T2A, through a series of subsequent orders, the Texas PUC fine-tuned the set of performance measurements that ultimately became what is the current Appendix 17 of the T2A (including both a Performance Remedy Plan ("Plan") and Performance Measures). The performance measurements were developed after months, indeed years, of collaborative processes between competitive telecommunications carriers and SWBT, with disputes resolved through the exercise of the Texas PUC's authority. The T2A is scheduled to expire on October 13, 2003, however, which leaves open whether and how the performance measurements will continue to be effectuated after the expiration of the T2A.

The general purpose of performance measurements is to provide tangible verification that SWBT is complying with federal and state mandates to provide services to competitors in a manner at least equal to what is provided to itself, as

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[10] Project No. 16251; *Investigation Into Southwestern Bell Telephone Company's Entry Into the Texas InterLATA Market* ("271 Proceeding").

well as other competitors. Notwithstanding the limitations that have attended both SWBT's performance measurement reporting and the T2A remedy plan, it is critical to continue the performance measurements that have been established for SWBT to maintain at least some flow of information (beyond anecdotal data) regarding whether competing carriers receive service at a parity level of quality as SWBT provides to itself and to others. Absent performance measurements (and recognizing that SWBT's performance data is itself subject to questions regarding reliability and accuracy), regulators have no way to monitor whether this equal provision of service is occurring. Moreover, performance measurements appear to have had some positive impact in incenting SBC to work with CLECs to address service quality issues. Yet, in Texas PUC Docket No. 27315, SWBT is opposing the continuance of the performance measurement requirements, and there is no guarantee that they will be continued.[11] Without performance measurement requirements, SWBT will be even more successful in preventing the emergence of local service competition that could challenge its market power.

CONCLUSION

In considering whether to lift the Section 272 safeguards on SWBT's operations in Texas, Birch respectfully submits that the Texas PUC must take into

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[11] *See* Petition of Birch Telecom of Texas, Ltd., L.L.P. and Allegiance Telecom of Texas, Inc., for Establishment of Independent Performance Measurements and Standards, Public Utility Commission of Texas, Docket No. 27315, SWBT's Motion to Dismiss, filed March 13, 2003; SWBT's Accessible Letter CLEC03-30, February 3, 2003.

consideration SWBT actions such as those described in the preceding sections which provide substantial evidence of the as-yet unchecked power of SWBT to unilaterally take actions that have a significant adverse impact on local competition. As AT&T notes in it's Petition, Congress imposed the Section 272 requirements "in recognition of the undeniable fact that, upon receipt of section 271 authorization, a BOC's local markets in a state will be merely "open" to competition and that a substantial . . . time will pass before competition sufficient to constrain the exercise of market power by the BOC can develop."[12] Indeed, and again as AT&T notes, the three year time period for the application of the section 272 safeguards was a "minimum" time period for such restrictions to be applied.[13] Given the slow pace of competitive advancement in the local market in Texas, the unfettered market power that SWBT still enjoys in the state, and the record of SWBT's repeated and continuing abuses of that market power, there appears to be ample justification for the Texas PUC to extend the Section 272 safeguards applied to SWBT in Texas for a minimum of another three years. Accordingly, Birch urges the Texas PUC to grant AT&T's Petition, and extend the application of Section 272 to SWBT in Texas for an additional three years.

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12 AT&T Petition at 2.

13 AT&T Petition at 2; 47 U.S.C. §§ 272(f)(1).

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Respectfully submitted,

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Gregory C. Lawhon
Senior Vice President & General Counsel
Russell C. Merbeth
Federal Policy Counsel
BIRCH TELECOM
2020 Baltimore Avenue
Kansas City, MO 64108
(816) 300-3731 (Tel)
(816) 300-3350 (Fax)

Counsel for Birch Telecom

Albert H. Kramer
Robert F. Aldrich
DICKSTEIN SHAPIRO MORIN
& OSHINSKY LLP
2101 L Street, N.W.
Washington, DC 20037-1526
(202) 828-2226 (Tel)
(202) 887-0689 (Fax)